No. 85-267

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In the Supreme Court of the United States

OCTOBER TERM, 1985

MATRIX ENTERPRISES, INC. and
WILLIAM R. ORMES,
Petitioners,

vs.

MILLINGTON TELEPHONE COMPANY, INC.,
CITY OF MILLINGTON, TENNESSEE,
MILLINGTON CATV, INC., and
WILLIAM S. HOWARD,
Respondents.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did petitioners' complaint fail to state a federal claim upon which relief can be granted, as was decided below by the trial court and all active judges of the Sixth Circuit?

2. Is misrepresentation or non-disclosure a necessary characteristic of "fraud"?

3. Where a complaint alleges facts establishing a legal defense to antitrust claims, may those claims be properly dismissed?

4. May a patently correct decision be disturbed because of putatively erroneous reasoning by the court below?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW I
TABLE OF CONTENTS II
TABLE OF AUTHORITIES III
STATEMENT OF THE CASE 2

A. *Parties* 2
B. *Alleged Facts* 3
C. *Alleged Violations* 4

REASONS WHY THE WRIT SHOULD BE DENIED 6

1. The alleged failure of a lower court to properly read a complaint does not call for an exercise of this Court's power of supervision 6
2. Petitioners' request to amend their complaint, made for the first time in this Court, does not justify review here 6
3. Petitioners' request to amend the trial court's judgment, or for a declaratory judgment on the preclusive effect of the dismissal below, made for the first time in this Court, does not justify review here 7
4. Petitioners' complaint does not state a RICO claim 8

A. "Mail" and "wire" fraud 9
B. Mail and wire "fraud" 11

5. Petitioners' complaint does not state a Sherman Act claim 14

A. State Action Exemption 15
B. *Noerr-Pennington* Doctrine 16

CONCLUSION 18

TABLE OF AUTHORITIES

Cases:

American National Bank and Trust Co. v. Haroco, Inc., ... U.S. ....., 53 *Law Week* 5067 (No. 84-822, decided July 1, 1985) 8

Angel v. Bullington, 330 U.S. 183 (1947) 7

Associated General Contractors of Calif., Inc. v. Calif. State Council, ... U.S. ....., 103 S.Ct. 897 (1983) 10

Biesenbach v. Guenther, 588 F.2d 400 (3d Cir. 1978) 7

Bell v. Hood, 327 U.S. 678 (1946) 7

Billy Baxter, Inc. v. Coca-Cola Co., 47 F.R.D. 345 (S.D. N.Y. 1969), *aff'd*, 431 F.2d 183 (2d Cir. 1970), *cert. den.*, 401 U.S. 923, *reh. den.*, 401 U.S. 1014 (1971) 7

Brown v. Chaffee, 612 F.2d 497 (10th Cir. 1979) 12

Calif. Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 16

Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389 (6th Cir. 1974) 12

Decker v. Massey-Ferguson, Ltd., 681 F.2d 111 (2d Cir. 1982) 12

Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc., 691 F.2d 241 (6th Cir. 1982) 11

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 15, 16

Federal Prescription Service, Inc. v. American Pharmaceutical Assn., 663 F.2d 253 (D.C. Cir. 1981), *cert. den.*, 455 U.S. 928 (1982) 17

Federated Department Stores v. Moitie, 452 U.S. 394 (1981) 7, 8

First American Title Co. of South Dakota v. South Dakota Land Tile Assn., 714 F.2d 1439 (8th Cir. 1983), *cert. den.*, ... U.S. ....., 104 S.Ct. 709 (1984) 17

Gilbuilt Homes, Inc. v. Continental Homes, etc., 667 F.2d 209 (1st Cir. 1981) 11

Haroco, Inc. v. American National Bank and Trust Co., 747 F.2d 384 (7th Cir. 1984) 9

Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266 (5th Cir. 1979) 11

Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975) 17

Mitchell v. Archibald & Kendall, Inc., 573 F.2d 429 (7th Cir. 1978) 7, 11

Naartex Consulting Corp. v. Watt, 722 F.2d 779 (D.C. Cir. 1983), *cert. den.*, ... U.S. ....., 104 S.Ct. 2399 (1984) 12

Parker v. Brown, 317 U.S. 341 (1943) 14

Rutledge v. Boston Woven Hose & Rubber Corp., 576 F.2d 248 (9th Cir. 1978) 12

Schreiber v. Burlington Northern, Inc., ... U. S. ....., 53 *Law Week* 4655 (No. 83-2129, decided June 4, 1985) 13

Securities and Exchange Commission v. Coffey, 493 F.2d 1304 (6th Cir. 1974), *cert. den.*, 420 U.S. 908 (1975) 12-13

Sedima, S.P.R.L. v. Imrex Company, Inc., ... U.S. ....., 53 *Law Week* 5034 (No. 84-648, decided July 1, 1985) 8

Southern Development Co. v. Silva, 125 U.S. 247 (1888) 12

Town of Hallie v. City of Eau Claire, 471 U.S. ....., 105 S.Ct. 1713 (1985) 14, 16

United Mine Workers v. Gibbs, 383 U.S. 727 (1966) 5

United Mine Workers v. Pennington, 381 U.S. 657 (1965) 15, 16

USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94 (6th Cir. 1982) 9

Warren v. Manufacturers Nat'l Bank, 759 F.2d 542 (6th Cir. 1985) 8-9

Statutes:

15 U.S.C., §§1 and 2 ..... 2, 4
18 U.S.C., §§1961, *et seq.* 2
Tennessee Code Annotated, §6-2-402 ..... 5, 8
Tennessee Code Annotated, §7-59-101, *et seq.* 15
Tennessee Code Annotated, §7-59-102(a) 15

Rules of Court:

U.S. Supreme Court Rule 17.1(a) 6
Federal Rules of Civil Procedure 9(b) 8, 11
Federal Rules of Civil Procedure 11 ..... 10, 11
Federal Rules of Civil Procedure 41(b) 7

Dictionaries:

Black's Law Dictionary (5th ed. 1979) 12
Webster's New Twentieth Century Dictionary (2d ed. 1968) 12

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents*—Millington Telephone Company, Inc. ("Millington Telephone"), City of Millington ("Millington" or "the City"), Millington CATV, Inc. ("Millington Cable") and William S. Howard ("Howard")—respectfully request that this Court deny the petition for writ of certiorari seeking review of the Sixth Circuit's decision in this case. (That Per Curiam Order, affirming the trial court's dismissal of petitioners' complaint, is unreported but is reprinted at pages A1-3 of the Appendix to the petition.)

*None of the corporate respondents has any parent companies, non-wholly owned subsidiaries or affiliates.

STATEMENT OF THE CASE

This case arises out of petitioners' unsuccessful venture into the Millington, Tennessee political arena. After losing there, they resorted to the courts in an attempt to obtain relief under the Sherman Act[1] and the RICO statutes.[2]

The case is before this Court on the Sixth Circuit's affirmance of the district court's grant of respondents' motions to dismiss petitioners' complaint for failure to state a federal claim upon which relief can be granted. Therefore, the allegations of petitioners' complaint must be regarded as true.[3]

A. Parties

Petitioners, plaintiffs below, are Matrix Enterprises, Inc. (hereinafter "Matrix"), a Tennessee corporation, and William R. Ormes ("Ormes"), a resident of Tennessee. (Complaint paras. 3-4, pet. A22.) At all material times, Matrix provided cable television service to subscribers in Tennessee, Ohio, Kentucky and Illinois. (Para. 3, pet. A22.) Ormes is an independent contractor engaged in the business of selling cable television franchises for Matrix. (Para. 4, pet. A22.) As compensation for his services, he receives a percentage of the revenue obtained by Matrix from subscribers in those areas where he secures a franchise. (Para. 4, pet. A22.)

Respondents are Millington, a municipal corporation chartered by the State of Tennessee to provide govern-

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1. 15 U.S.C., §§1 and 2.

2. 18 U.S.C., §§1961, *et seq.*

3. Extensive discovery below has shown that many of the "facts" alleged in the complaint are not true. Nevertheless, the following summary assumes that they are correct.

mental services to the residents of Millington (complaint para. 8, pet. A23); two Tennessee corporations, Millington Telephone and Millington Cable (paras. 5, 7, pet. A22-23); and one individual, Howard, a resident of Millington and, at all relevant times, a member of its Board of Mayor and Alderman ("the Board"). (Para. 6, pet. A23.) Millington Telephone is a public utility providing telephone service in and to the residents of Millington and certain outlying areas. (Para. 5, pet. A22-23.) Millington Cable provides cable television service to subscribers in Millington pursuant to a franchise originally granted by the City to Millington Telephone but subsequently assigned, with the City's approval, to Millington Cable. (Para. 7, pet. A23.) Howard, at all relevant times, was a shareholder and Chief Executive Officer of Millington Telephone. (Para. 6, pet. A23.) Howard was also alleged to be a principal owner of Millington Cable. (Paras. 6, 7, pet. A23.)

B. Alleged Facts

On April 2, 1979, Millington Telephone asked the Board for a franchise to provide cable television service to the residents of Millington. (Para. 18, pet. A26.) On July 2, 1979, the Board enacted Millington Ordinance No. 1979-8, which granted Millington Telephone a non-exclusive franchise to provide cable television services in Millington for a period of thirty-five (35) years. (Paras. 19-20, pet. A26-27.) The franchise was made contingent upon Millington Telephone's obtaining within three years the necessary cross-ownership waiver which the FCC requires before any telephone company may provide cable television service in the same area. (Para. 25, pet. A27-28.) On May 2, 1980, Millington Telephone petitioned the FCC for the cross-ownership waiver. (Para. 30, pet. A30.)

In June, 1980, almost one year after Millington Telephone obtained the franchise (para. 19, pet. A26), Ormes, on behalf of Matrix (para. 4, pet. A22), first expressed an interest in obtaining a cable franchise from Millington. (Para. 31, pet. A29.) He was advised that the City was not accepting or considering applications for cable franchises. (Para. 31, pet. A29.) Later in the same month he "sent" each Board member a letter expressing his interest in a franchise. (Para. 33, pet. A29.) The complaint makes no mention of what, if any, response Ormes or Matrix received to these letters, and it makes no mention of any further communication between Ormes (or Matrix) and the Board.

On November 24, 1980, before the FCC ever ruled on Millington Telephone's cross-waiver petition, the Board approved an assignment of the franchise from Millington Telephone to Millington Cable. (Paras. 35-36, pet. A29-30.) Board approval was required because the ordinance granting the franchise stated that it could not be sold, transferred, or assigned without the approval of the Board. (Para. 29, pet. A28.) On or about December 9, 1980, Millington Telephone withdrew its cross-waiver petition to the FCC. (Para. 36, pet. A30.)

On March 10, 1981, Ormes, acting for Matrix, "sent" to Howard a letter expressing Matrix's interest in buying the franchise rights held by Millington Cable. (Para. 37, pet. A30.) On March 13, 1981, Howard "sent" Ormes a letter stating that the franchise was not for sale. (Para. 38, pet. A30.)

C. Alleged Violations

Petitioners allege that respondents, in violation of Sections 1 and 2 of the Sherman Act, conspired with unnamed Board members to give Millington Telephone, and

subsequently its assignee, Millington Cable, the Millington cable franchise and to exclude the plaintiff from that market. (Paras. 43-62, pet. A31-38.) They also allege that respondents violated the RICO statutes. (Para. 63-66, pet. A38-40.) Specifically, they allege that Howard, in conspiracy with the other respondents and persons unnamed, conducted, through the businesses of the other respondents, a pattern of racketeering activity consisting of at least two acts of mail and wire fraud. (Paras. 63-66, pet. A38-40.) Petitioners allege that Howard, in securing the award of the franchise to Millington Telephone (and its subsequent assignment to Millington Cable), violated the Tennessee conflict of interest statute (Tennessee Code Annotated, Section 6-2-402)[4] in furtherance of a scheme by respondents to "defraud" the citizens of Millington by denying them the "conscientious, loyal, faithful and unbiased services, judgment, decisions and actions of the Board. . . ." (Para. 64, pet. A38-39.)

In their complaint, petitioners also sought a judgment declaring that both the 1979 ordinance originally granting the cable franchise and the 1980 ordinance permitting its assignment to Millington Cable were void, because their enactment violated the above-mentioned conflict of interest statute. (Complaint, prayer for relief paras. 2-4, pet. A41-42.) There being no diversity jurisdiction, and the courts below having decided that the complaint failed to state any Federal claim upon which relief could be granted, the State law claims were dismissed for lack of subject matter jurisdiction. *See, United Mine Workers v. Gibbs*, 383 U.S. 727 (1966).

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4. This statute is printed in full at pet. 3.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The alleged failure of a lower court to properly read a complaint does not call for an exercise of this Court's power of supervision.

Petitioner asserts (pet. 14) that the Sixth Circuit "did not read the complaint or is trying to mislead for the purpose of attempting to make final a ruling with no substantiation in law or in fact." With no basis (of record or otherwise) for doing so, petitioners charge the panel who decided against them, and every other active judge of the Circuit who declined to grant a rehearing, with either knowingly deciding the case wrongly or not reading the dismissed complaint. Surely petitioners' language outreaches their intended meaning.

Respondents respectfully suggest that this Court ought not review a decision because of a petitioner's unsupported view that the Court below was inept, however firmly held that view may be. Neither does a lower court's mere disagreement with a litigant about the scope and content of a pleading justify review by this Court. United States Supreme Court Rule 17.1(a).

2. Petitioners' request to amend their complaint, made for the first time in this Court, does not justify review here.

During the first 3-1/4 years of this litigation, despite completion of substantial discovery in the trial court and extensive briefing in both that court and the Sixth Circuit, petitioners never requested leave to amend their dismissed complaint. They now request permission of this Court to do so. (Pet. 13.) The Circuit Courts have held without dissent that seeking review prior to asking leave

to amend constitutes an election to stand on the unamended complaint. *Mitchell v. Archibald & Kendall, Inc.*, 573 F.2d 429, 433 (7th Cir. 1978); *Biesenbach v. Guenther*, 588 F.2d 400, 403 (3d Cir. 1978); *See, also, Billy Baxter, Inc. v. Coca-Cola Co.*, 47 F.R.D. 345 (S.D. N.Y. 1969), *aff'd*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923, *reh. den.*, 401 U.S. 1014 (1971). Respondents respectfully submit that such a rule derives necessarily from principles of sound judicial administration, and is equally applicable here. For this reason, and also for the reason discussed in the next paragraph, review here is not warranted.

3. Petitioners' request to amend the trial court's judgment, or for a declaratory judgment on the preclusive effect of the dismissal below, made for the first time in this Court, does not justify review here.

Petitioners failed to move in the trial court to insert the words "without prejudice" into the judgment. Nor did they raise this "issue" in the Sixth Circuit, not even in their Petition for a rehearing. They now request this Court (pet. 13) to require the Sixth Circuit to do something neither lower court was ever asked to do.

Fed.R.Civ.P. 41(b), which has not changed in 20 years, clearly provides that a dismissal for failure to state a claim "operates as an adjudication upon the merits," in accordance with the Court's holdings in *Angel v. Bullington*, 330 U.S. 183 (1947) and *Bell v. Hood*, 327 U.S. 678 (1946). The preclusive effect of such a judgment of dismissal had been made eminently clear a year before petitioners commenced this litigation, by this Court's decision in *Federated Department Stores v. Moitie*, 452 U.S. 394 (1981). The discussion at petition 10-13 simply ignores this Court's key decisions governing the legal issues addressed, and argues the very

opposite of what they hold. *Compare, Federated Department Stores v. Moitie, supra,* 452 U.S. at 398, n.3, and accompanying text, with pet. 10-13.

Respondents respectfully submit that the well-settled law grounded in the three last-cited cases should not be overruled, especially to grant relief not requested in the lower courts. Accordingly, review here is unwarranted.

4. Petitioners' complaint does not state a RICO claim.

Petitioners' complaint (paras. 18-32, 63-66; pet. A26-31, A38-40) claims that at least two instances of wire or mail fraud occurred "in furtherance of a scheme which included defrauding (*sic*) the constituent citizens of Millington by denying them the conscientious, loyal, faithful and unbiased services, judgment, decisions and actions of the Board and each of its members, including Howard, free from the conflict of interests prohibited by *Tennessee Code Annotated,* §6-2-402." (Paras. 64 and 66; pet. A39 and A40.) By ignoring Fed.R.Civ.P. 9(b), the difference between the plain meanings of "defraud" and "deprive," settled law, and paragraph 41 of their complaint, petitioners erroneously assert that they have stated a RICO claim. They are wrong for at least two reasons.[5]

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5. The petition urges the applicability of this Court's recent decisions in *Sedima, S.P.R.L. v. Imrex Company, Inc.,* ..... U.S. ....., 53 *Law Week* 5034 (No. 84-648, decided July 1, 1985) and *American National Bank and Trust Company v. Haroco, Inc.,* ..... U.S. ....., 53 *Law Week* 5067 (No. 84-822, decided July 1, 1985). Neither bears any application here. The question presented in *Haroco* was whether a special RICO-type injury is a necessary element of a RICO claim. 53 *Law Week* at 5068. *Sedima,* presented the additional issue of whether a criminal conviction of a civil defendant is a necessary element of a RICO claim. 53 *Law Week* at 5034. This Court gave a negative answer to each question. The Sixth Circuit has never held to the contrary, *see Warren v. Manufacturers Nat'l Bank,* 759 F.2d 542 (6th Cir.

(Continued on following page)

A. "Mail" and "wire" fraud.

Petitioners twice allege (complaint paras. 64 and 66; pet. A39 and A40) the bare legal conclusion that respondent Howard, in furthering the alleged scheme, "used the United States mails and interstate wire transmissions on more than two occasions within a period between April 1979 and March 13, 1981. . . ." The conclusion is unsupported by any alleged facts. Nowhere else in the complaint are any interstate wire transmissions even hinted at. The only hint of any mailings are in paragraph 33 of the complaint (pet. A29) that petitioner Ormes (not respondent Howard) "sent a letter;" in paragraph 37 (pet. A30) that petitioner Matrix (not respondent Howard) "sent a letter;" and in paragraph 38 (pet. A30) that respondent Howard "sent a letter." The complaint does not allege how any of the letters were "sent," nor does it indicate how such letters (which were "sent" one and two years after the cable rights were granted) furthered the alleged fraudulent scheme. In any event, however, the bare conclusion that jurisdictional means were used twice by Howard is only supported, by any stretch of the imagination, by a factual allegation that he "sent" only one letter.

Just two years ago this Court reversed a judgment of the Ninth Circuit, which had reinstated an antitrust

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Footnote continued—

1985) and *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94 (6th Cir. 1982), and did not purport to do so below.

As for the Seventh Circuit's opinion in *Haroco*, 747 F.2d 384 (7th Cir. 1984), quoted at pet. 16-17, the quoted language was rejecting defendants' argument "that the allegations in a civil RICO complaint must be as specific as a criminal bill of particulars and must establish probable cause to believe that the defendant committed the predicate racketeering offenses." *Id.* at 403. Neither respondents nor the courts below ever urged such a proposition in this case. That issue is not present, nor is it presented, here.

claim dismissed by the trial court for failure to state a claim, stating:

> As the case comes to us, we must assume that [plaintiff] can prove the facts alleged in its amended complaint. It is not, however, proper to assume that [plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged.[11]

> 11. [Plaintiff] had an adequate opportunity to amend its pleading to add factual allegations demonstrating that the District Court's decision to dismiss the complaint was based on a misunderstanding of its antitrust claim.

Associated General Contractors of California, Inc. v. California State Council, ... U.S. ....., 103 S.Ct. 897, 902 (1983).

Here, too, petitioners had an adequate opportunity to amend. Respondents' motions to dismiss were filed in July of 1982, briefed by September 13, 1982, and argued on October 28, 1982. In the meantime, petitioners had fully deposed all defendants and their representatives. Fourteen months later the trial court dismissed the complaint. The Sixth Circuit affirmed seven months ago. Petitioners then unsuccessfully sought a rehearing *en banc*, but still did not seek to amend. Only now, and in this Court, do petitioners first express a desire to amend, and they do so without even suggesting that the defects in the complaint can be cured by amending within the good faith requirements of Fed.R.Civ.P. 11. As will be shown below, petitioners have affirmatively alleged facts demonstrating both the absence of a RICO claim and defenses to their

antitrust claims. Thus, salvaging petitioners' claims within the requirements of Rule 11 is not possible.

The Circuit Courts are in agreement that a civil damage complaint based on a statutory violation "must allege *facts* from which it can be determined as a matter of law" that the violation occurred. *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 274 (5th Cir. 1979). *Accord*: *Gilbuilt Homes, Inc. v. Continental Homes, etc.*, 667 F.2d 209 (1st Cir. 1981); *Dunn & Mavis, Inc, v. Nu-Car Driveaway, Inc.*, 691 F.2d 241, 243 (6th Cir. 1982); *Mitchell v. Archibald & Kendall, Inc.*, 573 F.2d 429, 433 (7th Cir. 1978). Petitioners have alleged, at most, facts from which it can be determined as a matter of law that only one use of the mails occurred and no use of interstate wire transmissions occurred, in furtherance of the alleged fraudulent scheme. A RICO claim requires two. Dismissal below of the patently insufficient RICO claim does not warrant review by this Court.

B. Mail and wire "fraud".

Petitioners contend that Howard's (and the rest of the Board's) alleged conflict of interest deprived the citizens of Millington of their right to unbiased representation. Petitioners then assert that such a deprivation constitutes fraud. Petitioners are forced into this tortured and legally unsupported construction of the word "defraud" because they candidly and affirmatively pleaded (complaint, para. 41; pet. A31) that the alleged conflict was well-known. The complaint alleges no falsehoods, half truths, or withholding of material information by respondents or anybody else.

Fed.R.Civ.P. 9(b) requires that "all averments of fraud . . . shall be stated with particularity," and the Courts of

Appeals strictly enforce its requirements. *See, e.g., Naartex Consulting Corp. v. Watt*, 722 F.2d 779 (D.C. Cir. 1983), *cert. denied*, ... U.S. ....., 104 S.Ct. 2399 (1984); *Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111 (2d Cir. 1982); *Rutledge v. Boston Woven Hose & Rubber Corp.*, 576 F.2d 248 (9th Cir. 1978); *Brown v. Chaffee*, 612 F.2d 497 (10th Cir. 1979); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389 (6th Cir. 1974). There is no case holding that activity involving full disclosure constitutes fraud. Petitioners' complaint does not allege fraud at all, much less give respondents notice of the time, place and nature of the alleged fraud.

This Court held 100 years ago that "fraud" involves perversion of truth. *Southern Development Co. v. Silva*, 125 U.S. 247 (1888). *Webster's New Twentieth Century Dictionary* (2d ed. 1968), at p. 729, defines "fraud" as . . . 1.(a) deceit; trickery; cheating; (b) in law, intentional deception to cause a person to give up property or some lawful right. . . . 2. something said or done to deceive; trick; artifice." *Black's Law Dictionary* (5th ed. 1979) at p. 594, defines "fraud" as "An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Any kind of artifice employed by one person to deceive another."

A decade ago, the Sixth Circuit explicitly held that a financial transaction with a governmental unit, even if illegal under state law, was not fraudulent because there was full disclosure. *Securities and Exchange Commission*

v. Coffey, 493 F.2d 1304, 1312 (6th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975). Just this past term, this Court also squarely rejected an attempt, like petitioners', to remove deceit from the time-tested meaning of the word "fraudulent." *Schreiber v. Burlington Northern, Inc.*, ... U.S. ....., 53 *Law Week* 4655 (No. 83-2129, decided June 4, 1985). There, as here:

> Petitioner reads the phrase "fraudulent, deceptive or manipulative acts or practices" to include acts which, although fully disclosed, "artificially" affect the price of the takeover target's stock. . . .
>
> * * *
>
> All three species of misconduct, *i.e.*, "fraudulent, deceptive or manipulative," listed by Congress are directed at failures to disclose.
>
> 53 *Law Week* at 4657.

In affirming the Ninth Circuit, which had upheld the trial court's dismissal of the complaint, this Court concluded:

> The amended complaint fails to allege that the cancellation of the first tender offer was accompanied by any misrepresentation, non-disclosure or deception. The District Court correctly found, "All activity of the defendants that could have conceivably affected the price of El Paso shares was done openly."
>
> 53 *Law Week* at 4658-59.

Here, as in *Schreiber*, the very activity which petitioners allege was "fraudulent"—i.e., the Board's awarding cable rights to a corporation controlled by a member of the Board, supposedly in violation of a state conflict-of-interest law, was done openly. The cable rights are explicitly alleged to have been awarded by the City "full

well knowing" of the allegedly illegal conflict of interest. There is no allegation of misrepresentation, non-disclosure or deception; only an allegation that the allegedly illegal acts were done *despite* full disclosure. In short, petitioners affirmatively pleaded the *absence* of "fraud."

Because petitioners' complaint clearly fails to plead facts which would constitute *two* acts of wire or mail fraud, and because it affirmatively pleads the absence of fraud, the complaint fails to state a RICO claim and was properly dismissed below. Accordingly, review here is unwarranted.

5. Petitioners' complaint does not state a Sherman Act claim.

The Sixth Circuit, in affirming the dismissal of the Sherman Act claims, noted one of the obvious problems confronting petitioners—the non-exclusive nature of the franchise created by the ordinance.[6] There are, however, other equal, if not greater, flaws in petitioners' complaint. Specifically, the allegations of the complaint, even if true, unequivocally establish two complete defenses to all of petitioners' antitrust claims. First, the claims against the City are barred by the "state action" exemption announced originally by this Court in *Parker v. Brown*, 317 U.S. 341 (1943), which this Court recently applied expansively in *Town of Hallie v. City of Eau Claire*, 471 U.S. ....., 105 S.Ct. 1713 (1985). Second, the alleged conduct of the private respondents, even when considered in the worst possible light afforded by the allegations of the complaint,

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6. Petitioners discuss at length whether or not they conceded this at oral argument below. The ordinance in question states that the franchise is non-exclusive, and petitioners have not below, nor do they here, point to any allegation that it is an exclusive franchise.

constitutes nothing more than political activity clearly protected by the *Noerr-Pennington*[7] doctrine. Though petitioners chose not to address these issues, we shall discuss them briefly, because consideration of these issues necessarily leads to the conclusion that the antitrust claims, like the RICO claims, are legally meritless.

A. State Action Exemption

At all material times there has been in effect the Cable Television Act of Tennessee, *Tenn. Code Ann.*, §7-59-101, *et seq.* (complaint para. 10, pet. A24), by which the State of Tennessee has clearly chosen to displace competition with local regulation in the field of cable television. For example, Section 7-59-102(a) provides:

> ". . . (a) The governing body of each municipality in each county in this state shall have the power and authority to regulate the operation of any cable television company which serves customers within its territorial limits by the issuance of franchise licenses after public notice and showing the terms of any proposed franchise agreement and public initiation for fees and not inconsistent with any rules and regulations of the federal communications commission."

This is a clear statutory command to Tennessee municipalities to regulate the cable television industry by deciding which, if any, company would be allowed to provide cable television services within its borders.

It is obvious that the challenged acts of Millington, like those of the City of Eau Claire, Wisconsin, "were taken pursuant to a clearly articulated state policy to re-

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7. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

place competition in the provision of [cable] services with regulation." *Town of Hallie v. City of Eau Claire, supra,* 471 U.S. at ....., 105 S.Ct. at 1712. The alleged conduct on the part of the City is, therefore, exempt from antitrust liability.

B. Noerr-Pennington Doctrine

Just as the "state action" doctrine clearly exempts the City from antitrust liability, the *Noerr-Pennington* doctrine, with equal clarity, immunizes the conduct of the private respondents. Application of the principles enunciated in this Court's decisions in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra, United Mine Workers v. Pennington, supra,* and *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972), mandates the conclusion that the conduct of the private respondents, even if given the most unfavorable gloss that the complaint will allow, is protected First Amendment activity.

This case involves, purely and simply, a political battle in a purely political (as opposed to adjudicative) context. One side obtained what it wanted from the Board, the other did not. According to the complaint, Matrix tried only once, in June of 1980, almost one year after enactment of the ordinance awarding the franchise to Millington Telephone, to have the Board consider it as a possible franchisee. (Para. 31, pet. A29.) This overture having been rebuffed, Matrix made no additional approaches to the Board. The fact that the Board, in deciding a year earlier to award the franchise to Millington Telephone and in subsequently refusing to consider Matrix's overtures, may have been influenced by the joint petitioning efforts of the private respondents avails petitioners of nothing. It is precisely such political activity that is protected from

antitrust regulation by the *Noerr-Pennington* doctrine. *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975); *First American Title Co. of South Dakota v. South Dakota Land Title Assn.*, 714 F.2d 1439 (8th Cir. 1983), *cert. denied*, ... U.S. ....., 104 S.Ct. 709 (1984); *Federal Prescription Service, Inc. v. American Pharmaceutical Assn.*, 663 F.2d 253 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982).

Further discussion of these controlling antitrust issues is not warranted in view of petitioners' failure to discuss them at all. Petitioners' allegations include facts which establish a legal defense to their antitrust claims under long-established principles enunciated by this Court and followed over the years by the Courts of Appeals. Petitioners' antitrust claims were properly dismissed below. Accordingly, review here is not warranted.

CONCLUSION

For all of the foregoing reasons, respondents respectfully submit that the petition for a writ of certiorari to the Sixth Circuit seeking review of the patently correct decision below should be denied.

Respectfully submitted,

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